In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1286

TYLER INDEPENDENT SCHOOL DISTRICT, ET AL., PETITIONERS

v.

HONORABLE WILLIAM WAYNE JUSTICE, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TEXAS, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND ALTERNATIVE PETITION FOR A WRIT OF MANDAMUS AND/OR PROHIBITION

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

1. Petitioners seek review of the court of appeals' denial of their petition for a writ of mandamus or prohibition against the respondent district judge requiring him to vacate an order clarifying the duties, responsibilities, and authority of a bi-racial commit-

tee. The judge had entered this order in a school desegregation case brought by the United States under Title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6. *United States* v. *Tyler Independent School District*, C.A. No. 5176 (E.D. Texas, order entered December 17, 1971) (Pet. App. D-1).

The bi-racial committee had been established pursuant to a Memorandum Opinion and Order entered by the district court on July 8, 1971, after a hearing [1] on a motion for supplemental relief by the United States (Pet. App. B-1). The district court entered subsequent orders with regard to the bi-racial committee: the order of July 15, 1971 (Pet. App. C-1) specified the manner of nominating members; the order of August 3, 1971, appointed the committee members; and the order of August 25, 1971, approved recommendations by the bi-racial committee and the school board regarding resolution of the cheerleader election dispute involved in the *Dunn* case, note 1, *supra*. The district court entered its order of Decem-

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[1] The court consolidated the hearing on the United States' motion with a hearing on a motion for a preliminary injunction in *Dunn* v. *Tyler Independent School District*, C.A. No. 5285 (E.D. Texas). The *Dunn* case was brought on behalf of a group of black students who had been suspended from the Tyler High School after protesting a cheerleader election held at the school. On May 27, 1971, the district court found that these students had been improperly dismissed by the school board and ordered the students reinstated. 327 F. Supp. 528 (E.D. Tex.). The court of appeals reversed in part and affirmed in part; the district court's order was reinstated in part for other reasons. *Dunn* v. *Tyler ISD*, No. 71-2395 (C.A. 5, April 11, 1972).

ber 17, 1971, which petitioners here seek to have vacated, in response to a letter from the Chairman of the Bi-racial Committee requesting clarification of that committee's duties and responsibilities. Petitioners did not appeal any of the above orders.

2. The court of appeals properly denied the petition for a writ of mandamus or prohibition because the order petitioners seek to have vacated was reviewable by appeal pursuant to 28 U.S.C. 1292(a)(1) as an order modifying an injunction. Mandamus or prohibition "may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute." *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 26.

3. Moreover, the order of December 17, 1971, was not an abuse of the district court's power nor "so palpably improper as to place it beyond the scope" of the Rules of Civil Procedure. *La Buy* v. *Howes Leather Company*, 352 U.S. 249, 256. District courts have broad discretion in fashioning remedies to convert formerly dual school systems to unitary systems free of discrimination. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16; *Green* v. *County School Board*, 391 U.S. 430. The establishment of bi-racial committees to assist school boards and district courts in meeting the problems that arise during the transition from a dual to a unitary system has consistently been approved by the Fifth Circuit. *Ellis* v. *Board of Public Instruction of Orange County*, 423 F. 2d 203, 206; *Singleton* v. *Jackson Municipal Separate School District*, 426 F. 2d 1364, 1370; *Smith*

v. *St. Tammany Parish School Board*, 316 F. Supp. 1174 (E.D. La.), affirmed, 448 F. 2d 414. Contrary to petitioners' suggestion, the bi-racial committee is not the equivalent of a master appointed under "a deliberate policy in open defiance" of Rule 53, Federal Rules of Civil Procedure, see *Will* v. *United States*, 389 U.S. 90, 102. The provisions of the December 17, 1971, order show that the committee's function is to provide advice and recommendations to the petitioner school board and the district court (Pet. App. D-4).

Petitioners speculate about a denial of due process in the future if the district court enters an order on the basis of the bi-racial committee's recommendation. But their due process claim can be raised in an appeal if such an order is entered and therefore is not a matter appropriate for mandamus or prohibition. *Roche* v. *Evaporated Milk Association*, *supra*; *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 547.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari and alternative petition for a writ of mandamus and/or prohibition should be denied.

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